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ECONOMICS AND THE STUDY OF LAW THE CONTRIBUTION OF HENRY C. SIMONS

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THE PROBLEM of the relationship between law and economics is not new. It is a problem with which legal education has been struggling for some time. It is an important problem even though there have been periods in American legal education when its importance has apparently not been recognized. Today the importance of some education in economics for lawyers seems more apparent as social legislation has created new forums in which the lawyer's duty is to present the economic facts and to argue the legal implications of economic policies.

We may suspect that economics has always been important for the lawyer. The Brandeis brief and its contribution to advocacy is within recent history, but courts and legislatures have always, although perhaps somewhat less consciously, taken into account what appeared to them to be the economic circumstances which might determine a legal problem. The Brandeis brief showed how modern methods for the collection of data might illuminate and thereby change the legal judgment on complicated social problems. But the common law cases on negotiability, price fixing, freedom of contract, and responsibility for industrial risks have shown an awareness by the courts of prevailing economic doctrines. The problem as to law and economics therefore has really never been whether the two are related but rather by what means economic doctrines and facts should be brought to bear on the legal determination of social problems.

In part because of the Brandeis brief and modern methods of fact collecting, the suggestion has sometimes been made that the promise of the relationship between law and economics would be in part fulfilled if lawyers were trained in modern methods of fact analysis and collection.

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It has further been thought that data relating to our great modern institutions should be infused into law study by making available to law students the institutional data that has been collected. There has been an awareness also that prevailing economic theories, whether correct or false, have played their part in shaping legal theory and therefore some discussion of the theories and rhetoric of economics was an appropriate part of the law curriculum. But the methods and devices by which all this should be accomplished have never been made clear.

We at the University of Chicago Law School believe that substantial progress has been made towards an effective integration of law and economics in the law school curriculum. Such progress as has been made, and we believe will be made in the future, is due in the greatest degree to Henry C. Simons, late Professor of Economics in the law school.

In 1933 the school began its experiments in the integration of the study of law with that of economics, history, moral and political philosophy, and other related fields. In this period Professor Simons taught economics as part of the "pre-professional" program of the school. Of first importance, however, in the development of the school, was the informal seminar in economic theory conducted by him for members of the law faculty. In this seminar, and in conferences through the years immediately following, were developed our views not only as to the extent and type of study of economics necessary for the training of lawyers, but also as to the sequence and arrangement of fields of law in which underlying issues of economic policy might most fruitfully be explored.

Simons was insistent that three general problems relative to economic activity must be clearly distinguished: first, the problem of controlling the allocation of resources among the various uses and of determining relative prices of various goods and services; second, the problem of business fluctuations; and third, the problem of inequality. As explained elsewhere in this issue, he was profoundly convinced that the preservation of political freedom requires that the first of the three problems be worked out through freedom of enterprise and free markets, with appropriate legal institutions protecting markets from restraints and monopoly and promoting responsibility in business decisions. He was convinced also that the presumption is against subsidies, that hidden subsidies are always bad, and that a subsidy should always take a form which requires the recipients to defend its continuance. He gravely mistrusted efforts to deal with the problem of depressions or that of inequality by measures which interfere with the operation of free markets and which introduce hidden subsidies.

Simons' analysis thus furnished a structure in which the subject matter

of the basic legal fields was re-examined, and in the light of which the organization and teaching of many of the courses were altered. Take, for example, the rules concerning the liability of employers and its extension through workman's compensation acts. Are these rules to be understood as devices to reduce inequality by shifting the burden of industrial injuries on the principle of ability to pay? Or are they to be understood as efforts to require business enterprises to act responsibly in the light of all risks of the enterprise, efforts to require that all of the social costs of economic activities shall constitute costs of firms operating in the field, efforts to prevent subsidizing activities where risks of injury are high. The latter analysis has significance also for many problems of "absolute liability" in the law of torts. It may also be seen behind the cases which hold a parent corporation immune from debts of its subsidiaries only if the subsidiaries are "adequately financed" for the risks of their operations.

The influence of Simons' analysis has been even more extensive in fields of law which have been marked by conscious and comprehensive legislation. Simons believed that the second general economic problem—that of fluctuations of business activity—should be dealt with by the removal of monetary uncertainty; that is, by the maintenance of a relatively stable general price level through strict control of the supply of money and through government fiscal policy. The problem of inequality, he insisted, should be dealt with as one of tax reform, extension of social services, and relief. His program showed the sharp contrast between *laissez faire* as the slogan for opposition to all government control of business and *laissez faire* as referring to freedom to operate within a legal framework designed to preserve competition.

Reconsideration of legal fields in the light of this analysis brought to the fore interrelations between the fields which had been neglected. Thus, it came to be seen that problems of bankruptcy and corporate reorganization are not adequately understood when isolated from the study of the anti-trust laws and industry regulation of the type illustrated by the NRA codes. Again, the federal revenue system cannot be understood apart from the basic problems of hidden subsidies and incentives to invest or apart from problems of the control of industrial fluctuation and the distribution of income.

In short, what Simons brought to the law school and to legal education was an integrated theory of political economy. Other theories could become clear by difference or contrast. The important problems of law became illuminated. Another way of putting the matter is that Simons, because of the rigor of his thinking, forced attention first to the question as to whether or not the problem under consideration had any real signifi-

cance. Here the clarity of Simons' own thinking helped us to an understanding of the basic sameness of the important legal problems and the important economic problems. The problem of the hidden subsidy was seen as a segment of the larger problem of political responsibility in a democracy. The problem of judicial legislation resulting in the hidden subsidy then could be better understood. The *Appalachian Coal* case¹ could be seen as a bridge between the problems of bankruptcy and of competition, standing in a depression setting illuminated by Simons' insistence that the problem of business fluctuations would never be solved by promoting stability through restraints of trade.

Simons' contribution of course does not stand alone. His contribution to legal education was made along side of comparable work by Underhill Moore and William O. Douglas and Walton Hamilton—to mention only a few. It is a contribution which changed the curriculum at the University of Chicago Law School. Possibly the most striking change is in the work of the senior year of the new law school program in which two-thirds of the students' time is devoted to a sequence called Law and Economic Organization. Here are considered as a unit problems of industrial and labor organization, the determination of prices and wages, monetary and credit control, taxation and fiscal policy, corporate capital structures and reorganization.²

It is in the field of taxation and fiscal policy that Simons' contribution to the work of the school has been most detailed, but his contribution to the general structure of the program has been invaluable. Successive generations of law students—of every shade of social and political inclination—have found in his analysis means for deepening their understanding of legal institutions and criteria for testing proposals for legal change.

¹ See Rostow, *Bituminous Coal and the Public Interest*, 50 *Yale L.J.* 543 (1941); Hamilton, *Coal and the Economy—a Demurrer*, *ibid.*, at 595; Rostow, *Joinder in Demurrer*, *ibid.*, at 613.

² This sequence was described as follows, in the announcements of the school for 1941-42, before the war-time adjustments required the division of the material into smaller course units:

Law and Economic Organization.—A study of the effects of legal institutions upon the operation of the economic system and of the influence of economic factors in the development of legal institutions.

a) Monetary and credit policy and the control of industrial fluctuations. The Federal Reserve System and supplementary controls. Critical examination of current views as to the "business cycle."

b) The effect of industrial and labor organization on the processes determining prices and wages, and the legal devices and institutions designed to control or implement the various types of organization considered. Anti-trust laws; governmental price-fixing, including utility rate regulation; the legal status of unions and of typical activities of labor; union organization and collective bargaining under federal and state statutes; wages-and-hours legislation.

c) Problems of investment, debt, and failure in a fluctuating economy: corporate capital structures, "debtor relief," corporate reorganization plans.

d) The law of federal taxation—income, estate, and gift taxes. Problems of fiscal policy with reference to industrial fluctuations and the distribution of income.